

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish
Policies and Cost Recovery Mechanisms for
Generation Procurement and Renewable
Resource Development.

Rulemaking 01-10-024

**PROTECTIVE ORDER REGARDING CONFIDENTIALITY OF [SCE, PG&E or
SDG&E]¹ POWER PROCUREMENT INFORMATION**

1. This Protective Order shall govern access to and the use of all Protected Materials in this proceeding as hereinafter defined. Notwithstanding any order terminating this docket, this Protective Order shall remain in effect until, after notice and an opportunity to be heard, it is specifically modified or terminated by the Assigned Commissioner, the Assigned Administrative Law Judge (“Assigned ALJ”), the Law and Motion Administrative Law Judge (“Law and Motion ALJ”) or the California Public Utilities Commission (“CPUC” or “Commission”). This Protective Order does not address the right of employees of the Commission acting in their official capacities to view Protected Materials, because Commission employees are entitled to view such Protected Materials in accordance with the requirements of Section 583 of the Public Utilities Code and the Commission's General Order 66-C.

¹ It is contemplated that each utility will separately execute this Protective Order. For the purposes of this revised draft, the term “IOU” will be used in place of the name of the individual utility.

2. The parties acknowledge that in view of the Assigned Commissioner's Ruling Establishing Category and Providing Scoping Memo issued in this docket on April 2, 2002, this proceeding will be comprised of a single phase devoted to the review of energy procurement plans and the development of interim procurement cost recovery mechanisms for the period through December 31, 2003. The parties also acknowledge that the amount of data that is confidential or proprietary, and the identity of the parties submitting such data, may differ from time to time, depending on whether specific procurement plans or broader policy issues are under consideration. In light of this situation, the parties agree that modifications to this Protective Order may become necessary, and they further agree to work cooperatively with the Assigned ALJ, the Law and Motion ALJ, the Assigned Commissioner or the full Commission, as the case may be, to devise and implement such modifications in as timely a manner as possible.

3. **Definitions** -- The terms in this first definitional paragraph shall have a meaning consistent with the ideas set forth in the "Procurement Planning Proposals of the Southern California Edison Company [Edison] In Response to Order Instituting Rulemaking 01-10-024" (Edison Procurement Proposals) submitted in this docket on November 26, 2001. The term "**Procurement Plan**" means the type of plan for purchasing energy and/or capacity set forth in Section II.B. (at pages 39-55) of the Edison Procurement Proposals, whether the reference is to the type of initial Procurement Plan submitted by Edison or an update thereof. The term "**Procurement Plan Compliance Submittal**" refers to any one or more of the various types of filings intended to demonstrate the utility's compliance with an approved Procurement Plan, as described in Section II.C. (at pages 55-58) of the Edison Procurement Proposals. The term "**Notice of Objection**" refers to the pleading that Commission Staff (as defined below) may

submit objecting to a Procurement Plan Compliance Submittal or a transaction for which the utility is seeking pre-approval by the Commission, as set forth in Sections II.C.1. and II.D., respectively, of the Edison Procurement Proposals. Nothing in this first definitional paragraph shall be construed as an endorsement of any timeframe proposed in the Edison Procurement Proposals, as these are matters to be determined in interim decisions or a final decision in this docket.

- a) The term “redacted” refers to situations in which confidential or proprietary information in a document, whether the document is in paper or electronic form, has been covered, masked or blocked out. Thus, the “redacted version” of a document is one in which the document is complete except that the confidential or proprietary information contained therein is not visible because it has been covered, masked or blocked out. The term “unredacted” refers to situations in which confidential or proprietary information in a document, whether in paper or electronic form, has not been covered, masked or blocked out. Thus, the “unredacted version” of a document is one in which the document is complete, and the confidential or proprietary information contained therein is visible.
- b) The term “Protected Materials” means the confidential or proprietary information contained in the unredacted version, and not contained in the redacted version, of any of the following: (A) any initial Procurement Plan submitted as a compliance filing by [IOU] in this proceeding, and any subsequent revisions thereof; (B) any materials submitted or produced in connection with the review, revision or approval of any initial or revised [IOU] Procurement Plan; (C) any Procurement Plan Compliance Submittal that [IOU] may submit from time to time to the Commission's Energy Division and/or the Office of Ratepayer Advocates (which Division and Office, whether separately or collectively, are hereinafter referred to as “Commission Staff”); (D) any Notice of Objection prepared and sent by Commission Staff to [IOU] in response to a Procurement Plan Compliance Submittal; and (E) any materials submitted or produced in connection with the determination of the reasonableness of any

energy procurement transaction which is the subject of any such Notice of Objection. The reviews described in this paragraph are collectively referred to hereinafter as the “[IOU] Procurement Plan and Compliance Reviews.”

- c) Protected Material shall also include: (A) any information contained in or obtained from the unredacted materials described in the preceding paragraph; (B) any other materials that are made subject to this Protective Order by any assigned ALJ, Law and Motion ALJ, or Assigned Commissioner, or by the CPUC or any court or other body having appropriate authority; (C) notes of Protected Materials; and (D) copies of Protected Materials. [IOU] and Commission Staff, when creating any Protected Materials, shall physically mark such materials on each page (or in the case of non-documentary materials such as computer diskettes, on each item) as “PROTECTED MATERIALS”, or with words of similar import as long as one or more of the terms, “Protected Materials,” “Section 583” or “General Order No. 66-C” is included in the designation to indicate that the materials in question are Protected Materials.
- d) The term “Notes of Protected Materials” means memoranda, handwritten notes, or any other form of information (including information in electronic form) that copies or discloses materials described in Paragraph 3(b). Except as specifically provided otherwise in this Order, notes of Protected Materials are subject to the same restrictions as are Protected Materials.
- e) Protected Materials shall not include: (A) any information or document contained in the public files of the CPUC or any other state or federal agency, or in any state or federal court, unless such information or document has been determined to be protected by such agency or court; or (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order.
- f) The term “Non-Disclosure Certificate” shall mean the certificate annexed hereto as Appendix A by which persons who have been granted access to the Protected Materials of [IOU] shall, as a condition of such access, certify their understanding that such

access is provided pursuant to the terms and restrictions of this Protective Order, and that such persons have read such Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be sent to and retained by [IOU].

- g) The term Non-Market Participating Party ("NMPP") Reviewing Representative shall mean a person who is:
- 1) An employee of: (a) a state governmental agency other than the California Energy Commission (CEC) that (i) is not a Market Participating Party as defined in Paragraph 3(h)(1) hereof, and (ii) is statutorily authorized to obtain access to confidential data held by another state governmental agency upon execution of a written agreement to treat the data so obtained as confidential, as provided in Government Code Section 6254.5(e); or (b) any other consumer or customer group that [IOU] and ~~Commission Staff~~ the Director of the Commission's Energy Division or his designee ("Division Director") agree has a bona fide interest in participating on behalf of end-use customers in Procurement Plan and Compliance Reviews regarding [IOU], and which group is not a Market Participating Party as defined in paragraph 3(h)(1); or
 - 2) An attorney, paralegal, expert or employee of an expert retained by an NMPP for the purpose of advising, preparing for or participating in Procurement Plan and Compliance Reviews regarding [IOU].
 - 3) NMPPs shall identify their proposed Reviewing Representatives to [IOU] and ~~Commission Staff~~ Division Director and provide a curriculum vitae of the candidate, including a brief description of the candidate's professional experience and past and present professional affiliations for the last 10 years. [IOU] and ~~Commission Staff~~ Division Director shall advise the proposing party in writing within three (3) business days from receipt of the notice if either or both of them object to the proposed Reviewing Representative, setting forth in detail the reasons therefor. In the event of such objection, the proposing party, [IOU] and

Division Director ~~Commission Staff~~ shall promptly meet and confer to try to resolve the issue, and if necessary seek a ruling from either the assigned ALJ or the Law and Motion ALJ. In addition to determining whether the proposed Reviewing Representative has a need to know, the ALJ in ruling on the issue will evaluate whether the candidate is engaged in the purchase, sale or marketing of energy or capacity (or the direct supervision of any employee(s) whose duties include such activities), or the bidding on or purchasing of power plants or consulting on such matters (or the direct supervision of any employee(s) whose duties include such bidding, purchasing or consulting). Absent unusual circumstances as determined by the ALJ, a candidate who falls within the criteria set forth in the preceding sentence will ordinarily be deemed ineligible to serve as an NMPP Reviewing Representative.

- h) The term Market Participating Party (“MPP”) Reviewing Representative shall mean a person who is:
 - 1) An employee of a private, municipal, state or federal entity that engages in the purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or consulting on such matters, or an employee of a trade association comprised of such entities that engage in one or more of such activities; or
 - 2) An attorney, paralegal, expert or employee of an expert retained by an MPP for the purpose of advising, preparing for or participating in Procurement Plan and Compliance Reviews regarding [IOU].

4. Access of NMPP Reviewing Representatives to Protected Materials shall be granted only pursuant to the terms of this Protective Order. Participants in this proceeding who are designated as MPP Reviewing Representatives shall not be granted access to Protected Material, but shall instead be limited to reviewing redacted versions of documents that contain Protected Material.

5. Whenever [IOU] submits a document in this proceeding that includes data that [IOU] contends is confidential or proprietary, [IOU] shall also prepare a

redacted version of such document. The redacted version shall be sufficiently detailed in organization so that persons familiar with this proceeding (including MPP Reviewing Representatives) can determine with reasonable certainty the nature (but not the magnitude) of the data that has been redacted. The redacted version of any document required by this paragraph shall be served on all persons on the service list (or, in the case of discovery, on all persons entitled to the discovery responses) who are not entitled to obtain access to Protected Material hereunder. All disputes regarding redacted versions of documents shall be submitted for resolution to the CPUC in accordance with Paragraph 13 of this Protective Order.

6. Within thirty (30) days after (a) the issuance of a Commission resolution regarding an [IOU] Procurement Plan, or (b) the date on which an [IOU] Procurement Plan Compliance Review becomes final and no longer subject to judicial review, an NMPP Reviewing Representative shall, if requested to do so in writing by [IOU], return or destroy the Protected Materials. Within the same 30-day time period, the NMPP Reviewing Representative shall also submit to [IOU] and Commission Staff an affidavit stating that, to the best of the NMPP Reviewing Representative's knowledge, all Protected Materials subject to the request have been returned or destroyed. Notwithstanding the two preceding sentences, the NMPP Reviewing Representative may retain Notes of Protected Materials and copies of filings, official transcripts and exhibits, if any, prepared in the course of the NMPP Reviewing Representative's review of the Protected Materials, provided that such retained materials are maintained in accordance with Paragraphs 9 and 12 below. In the event the CEC receives a request that Protected Materials should be returned or destroyed, but the CEC Executive Director determines that the CEC needs to retain some or all of these Protected

Materials to carry out its statutorily-mandated tasks, the CEC may retain the Protected Materials, and the CEC Executive Director shall furnish [IOU] and Commission Staff with a letter setting forth the CEC's reasons for retaining the Protected Materials, as well as a list enumerating with reasonable particularity the Protected Materials so retained. To the extent Protected Materials are not returned or destroyed pursuant to this paragraph, they shall remain subject to this Protective Order, Section 583 of the California Public Utilities Code and CPUC General Order No. 66-C.

7. (a) In the event that the CPUC receives a request for a copy of or access to any Protected Material from the CEC, the procedure for handling such requests shall be as follows. The CPUC, after giving written notice to [IOU] of the request for the Protected Material, shall release such Protected Material to the CEC upon receipt from the CEC of an Interagency Information Request and Confidentiality Agreement (Interagency Confidentiality Agreement) identical in form to the agreement set forth in Appendix B hereto. Such Interagency Confidentiality Agreement shall (i) provide that the CEC will treat the requested Protected Material as confidential in accordance with this Protective Order, (ii) include an explanation of the purpose for the CEC's request, as well as an explanation of how the request relates to furtherance of the CEC's functions, (iii) be signed by a person authorized to bind the CEC contractually, and (iv) expressly state that furnishing of the requested Protected Materials to employees or representatives of the CEC does not, by itself, make such Protected Materials public. In addition, the Interagency Confidentiality Agreement shall include an express acknowledgment of the CPUC's sole authority (subject to judicial review) to make the determination whether the Protected Material should remain

confidential or be disclosed to the public, notwithstanding any provision to the contrary in the statutes or regulations applicable to the CEC.

7. (b) In the event the CPUC receives a request for a copy of or access to Protected Material from a state governmental agency other than the CEC that is authorized to enter into a written agreement sufficient to satisfy the requirements for maintaining confidentiality set forth in Government Code Section 6254.5(e), the CPUC may, after giving written notice to [IOU] of the request, release such Protected Material to the requesting governmental agency, upon receiving from the requesting agency an executed Interagency Confidentiality Agreement that contains the same provisions described in Paragraph 7(a) above, and that is otherwise substantively identical to the draft agreement set forth in Appendix B; *i.e.*, identical as to legal principles but with variations in language that are necessary due to the particular situation of the requesting agency.

8. If a request is made pursuant to the Public Records Act (PRA), Government Code § 6250, *et seq.*, that Protected Materials filed with or otherwise in the possession of the CPUC be produced, the CPUC will notify [IOU] of the PRA request and will notify the requester that the Protected Materials are public records that fall within the exclusions listed in Section 2 of General Order No. 66(c), and/or that there is a public interest served by withholding the records. *See* paragraphs 2.2 and 3.3 of General Order No. 66-C. In the event the CPUC receives a request from a federal governmental agency or via a judicial subpoena for the production of Protected Materials in the CPUC's possession, the CPUC will also notify [IOU] of such request. In the event that a PRA requester brings suit to compel disclosure of Protected Materials, the CPUC will promptly notify [IOU] of such suit, and Commission Staff and [IOU] shall cooperate in opposing the suit.

9. Protected Materials shall be treated as confidential by each NMPP Reviewing Representative in accordance with the certificate executed pursuant to Paragraphs 3(f) and 11 hereof. Protected Materials shall not be used except as necessary for the conduct of this proceeding, and shall not be disclosed in any manner to any person except (i) other NMPP Reviewing Representatives who are engaged in this proceeding and need to know the information in order to carry out their responsibilities, and (ii) persons employed by or working on behalf of the CEC or other state governmental agencies covered by Paragraphs 7(a) or 7(b).

10. It shall be a rebuttable presumption that (i) any study that incorporates, describes or otherwise employs Protected Material in a manner that could reveal all of a part of the Protected Material, or (ii) any model that relies upon Protected Material for algorithms or other computation(s) critical to the functioning of the model, shall also be considered Protected Material that is subject to Section 583 of the Public Utilities Code, the Commission's General Order 66-C, and this Protective Order. However, models that merely use Protected Material as inputs will not themselves be considered Protective Material. It shall also be a rebuttable presumption that where the inputs to studies or models include Protected Material, or where the outputs of such studies or models reveal such inputs or can be processed to reveal the Protected Material, such inputs and/or outputs shall be considered Protected Material subject to this Protective Order, unless such inputs and/or outputs have been redacted or aggregated to the satisfaction of the party producing the Protected Material. Unless a party, by means of notice and motion, obtains a ruling from the Assigned ALJ or the Law and Motion ALJ holding that the applicable presumption(s) from among the foregoing has been rebutted with respect to the model or study at issue, then any party who devises or propounds a model or study that incorporates, uses or is

based upon Protected Material shall label the model or study “Protected Material,” and it shall be subject to the terms of this Protective Order.

11. No NMPP Reviewing Representative shall be permitted to inspect, participate in discussions regarding, or otherwise be granted access to Protected Materials pursuant to this Protective Order unless such NMPP Reviewing Representative has first executed a Non-Disclosure Certificate and delivered it to [IOU]. [IOU] shall provide copies of executed Non-Disclosure Certificates to Commission Staff. Attorneys qualified as NMPP Reviewing Representatives shall ensure that persons under their supervision or control comply with this Protective Order.

12. In the event that an NMPP Reviewing Representative to whom Protected Materials are disclosed ceases to be engaged in Procurement Plan and Compliance Reviews concerning [IOU], or is employed or retained for a position whose employer is not qualified to be an NMPP under Paragraph 3(g)(1), then access to Protected Materials by that person shall be terminated. Even if no longer engaged in such reviews, every such person shall continue to be bound by the provisions of this Protective Order and the Non-Disclosure Certificate.

13. All disputes arising under this Protective Order shall be presented for resolution to the Assigned ALJ or the Law and Motion ALJ. Prior to presenting any such dispute to the applicable ALJ, the parties to the dispute shall use their best efforts to resolve it. Neither [IOU] nor the Commission Staff waives its right to seek additional administrative or judicial remedies after the Assigned ALJ or the Law and Motion ALJ has made a ruling regarding the dispute.

14. All documents containing Protected Material that are filed with the Commission or served ~~on parties to this proceeding~~ shall be placed in sealed envelopes or otherwise appropriately protected ~~containers~~, and shall be

endorsed to the effect that they are filed or served under seal~~ed~~ pursuant to this Protective Order. Such documents shall be marked with the words **“PROTECTED MATERIALS”** or one of the other, similar terms set forth in paragraph 3(c) hereof, and shall be ~~filed under seal and~~ served upon all NMPP Reviewing Representatives and persons employed by or working on behalf of the state governmental agencies referred to in Paragraphs 7(a) and 7(b) who are eligible to see the Protected Materials. Service upon the persons specified in the foregoing sentence may either be (a) by electronic mail in accordance with the Electronic Service Protocols set forth in Appendix A to the Order Instituting Rulemaking in this docket, (b) by facsimile, or (c) by overnight mail or messenger service. In the event the serving party chooses to serve the foregoing persons entitled to see Protective Materials by overnight mail or messenger service, the serving party shall give all parties 24 hours' electronic notice of its intention to do so. Any affected party who objects on account of delay to being served with the document(s) at issue by overnight mail or messenger service shall promptly notify the serving party of such objection, and in such a case the serving party shall arrange to have the document(s) containing the Protected Material hand-delivered on the date service is due to the party so objecting. Whenever service of a document containing Protected Material is made by overnight mail or messenger service, the Assigned ALJ shall be served with such document by hand on the date that service is due.

15. Nothing in this Protective Order shall be construed as limiting the right of [IOU], Commission Staff, a NMPP or a state governmental agency covered by Paragraph 7(a) or 7(b) from objecting to the use of Protected Material on any legal ground, such as relevance or privilege.

16. All Protected Materials filed with judicial or administrative bodies other than the Commission, whether in support of or as a part of a motion, brief or other document or pleading, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials that are subject to this Protective Order.

17. Neither [IOU] nor the Commission Staff waives its right to pursue any other legal or equitable remedy that may be available in the event of actual or anticipated disclosure of Protected Materials.

18. [IOU] and Commission Staff may agree at any time to remove the “Protected Material” designation from any material if, in their mutual opinion, its confidentiality is no longer required. In such a case, [IOU] will notify all parties that [IOU] believes are in possession of such materials of the change of designation.

Dated May 1, ~~April 25~~, 2002, at San Francisco, California.

/s/ A. KIRK MCKENZIE

A. Kirk McKenzie
Administrative Law Judge